93-582

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

IN THE MATTER OF: ARCHIE BENNETT, JR.,
Debtor.

ARCHIE BENNETT, JR.,
Petitioner,

v.

LSP INVESTMENT PARTNERSHIP, A TEXAS PARTNERSHIP, CHARLES SAPP, HOWARD BOYD, R. BRUCE LABOON, THOMAS REIDY, H. MICHAEL TYSON, JOHN C. NABORS, GEORGE CARAMEROS, WILLIS WITT, WALTER P. ZIVLEY, CROSHAW INVESTMENT PARTNERSHIP (BY ITS AGENT, FRED E. CROSHAW), W. ROBERT BROWN, OBIE & CO. (BY ITS AGENT, FRANK A. LIDDELL, JR.), CARL GALLOWAY, DON C. QUAST, AND JOE E. MCLEMORE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Fifth Circuit has created a new level of peril on an individual chapter 11 debtor in contravention of previously unambiguous Circuit law by imposing a non-dischargeable fiduciary duty on an individual debtor who does not have an express trust relationship with the aggrieved creditor.

2. The Fifth Circuit ignores the appellate presumption in favor of the winner at trial by improperly awarding double damages contrary to the bankruptcy court's findings.

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OPINIONS BELOW

This case has an extraordinary procedural history. The judgment sought to be reviewed by this Petition for Writ of Certiorari (the "Petition") was entered by the Court

of Appeals for the Fifth Circuit with opinion on July 15, 1993, and has itself been the product of significant post-judgment motions. The Court of Appeals' opinion and judgment amended an earlier Court of Appeals' opinion and judgment dated April 19, 1993, in favor of Respondents, which itself was a reversal and rendering of a September 1992 unanimous decision of the Fifth Circuit in favor of Petitioner. The first opinion and judgment of the Court of Appeals in favor of Petitioner (which has since been reversed, rendered and later modified) affirmed the decisions of the federal district court on December 14, 1990 and the bankruptcy court on February 23, 1990 in favor of Petitioner on the issues in this dispute. By its most recent judgment, the Court of Appeals for the Fifth Circuit has deprived Petitioner (and all debtors similarly situated) of his right to a discharge under bankruptcy law.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1254(1).

DATE OF ENTRY OF JUDGMENT

The Fifth Circuit Court of Appeals entered its judgment and opinion on July 15, 1993. Pursuant to 28 U.S.C. § 2101(c), this Petition for Writ of Certiorari was filed within 90 days thereafter. *See American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

STATUTORY PROVISIONS

Section 523(a)(4) of the Bankruptcy Code (11 U.S.C. § 523) provides that a debt may be nondischargeable if it arises from a breach of fiduciary duty or defalcation. The relationship necessary to sustain this relief is one of an express or statutory trust. *United States v. Mitchell*, 463 U.S. 206, 232 (1983); *Coburn Company v. Nicholas*, 956 F.2d 110 (5th Cir. 1992); *Carey Lumber Company v. Bell*, 615 F.2d 370 (5th Cir. 1980); *Angelle v. Reed*,

610 F.2d 1335 (5th Cir. 1980). The Fifth Circuit's decision has the effect of altering the underlying intent of section 523(a)(4). This Court has had occasion to emphasize that congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in express terms, provide for such action. *United States v. Mitchell,* 463 U.S. at 232. This Court has previously stated that the ultimate question is one of congressional intent, not one of whether courts think they can improve upon the statutory scheme that Congress enacted into law. *Touche Ross & Co. v. Redington,* 442 U.S. 560, 578 (1979). Likewise, this Court has stated that bankruptcy courts should look to the "plain meaning" of the statute. *Taylor v. Freeland & Kronz,* —— U.S. ——, 112 S.Ct. 1644 (1992).

CONSTITUTIONAL PROVISIONS

Article 1, § 8 of the United States Constitution delegates authority to Congress to establish uniform laws on the subject of bankruptcy throughout the United States.

STATEMENT OF THE CASE

This Petition follows an unusual history of appeals from the United States Bankruptcy Court for the Northern District of Texas, whereby the bankruptcy court on February 23, 1990, entered a final judgment in Adv. No. 389-3110, which granted Archie Bennett, Jr. ("Bennett" or the "Petitioner") a discharge by denying Respondents' Complaint to Determine Dischargeability of Debt under 11 U.S.C. § 523(a)(4). The bankruptcy court's decision was affirmed by the district court on appeal on December 14, 1990, albeit for somewhat different reasons. The bankruptcy court invoked jurisdiction over this matter pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157, and the

Standing Order of Reference of the bankruptcy court dated August 9, 1984.

The Petitioner requests this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 15, 1993 which modified an April 19, 1993 panel opinion which reversed and vacated the same panel's September 2, 1992 opinion affirming the district court. The Fifth Circuit's judgment now concludes that Bennett breached his fiduciary duty to the Respondents by virtue of his status as the general partner of Mariner Interest No. 20, Ltd. ("No. 20"), a limited partnership which itself was the managing general partner of Mariner/Greenspoint, Ltd. ("MG"), a Texas limited partnership formed to construct and operate a Marriott hotel near Greenspoint Mall in Houston, Texas.

Respondents hold 28.4375% of the limited partnership interest of MG. The remaining interests did not request a determination of dischargeability of their debts owed by Bennett under section 523(a)(4). Respondents have no direct claim against Bennett, other than he was a general partner of No. 20, which was itself liable as general partner of MG. Bennett had no direct ownership interest in MG. As a matter of law and pursuant to the MG partnership agreement, No. 20, and not Bennett, had full and exclusive authority to control and manage MG. Bennett had no connection to MG other than his status as the general partner of No. 20. Moreover, the evidence at trial established without dispute that Bennett delegated his duties as general partner of No. 20 to the Mariner Corporation ("Mariner"), a hotel management company which Bennett owned. Respondents, contending that partnership funds of MG were misappropriated, brought a nondischargeability action under 11 U.S.C. 523(a)(4) of the Bankruptcy Code ("Code") against Bennett rather than pursuing an action against No. 20.

The bankruptcy court recognized and honored the factual and legal distinction between No. 20 and Bennett and determined that No. 20, and not Bennett individually, was a fiduciary to the Respondents within the meaning of section 523(a)(4). At trial, no evidence was proffered by the Respondents to undermine the integrity of No. 20 as a distinct legal entity separate from Bennett, MG, Mariner, or any other entity, and there are no findings of fact or conclusions of law to support such finding on any appellate level. Similarly, the record on appeal contains no evidence (only Respondents' unsubstantiated arguments) of wrongdoing on Bennett's part. At trial, not one of the Respondents even testified, and Respondents proffered no evidence that the No. 20 partnership entity and MG's partnership agreement was ambiguous, should be ignored, or that their understanding of Bennett's individual duties to MG (which were specifically limited in scope by the express language of MG's partnership agreement) were anything other than those expressly set forth in the partnership agreement. The bankruptcy court correctly denied Respondents' relief. *See* App. at pp. 70a, 76-77a, 86-88a and 96a, Memorandum Opinion.[1] The bankruptcy court, in response to Respondents' requests, made findings of fact with respect to damages if its conclusion of law on Bennett's fiduciary role was reversed on appeal. The amount of damages determined as nondischargeable under section 523(a)(4) if Bennett was held subject to an express trust status was $904,204.40 as to the entire MG limited partnership, of which the Respondents' 28.437% would take their respective percentage. *See* App. at p. 96a, Memorandum Opinion.

On appeal, the district court ruled that as a matter of law there could be no express trust relationship between Bennett and the MG limited partners to satisfy the express

[1] "App. at p. —" refers to the Appendix filed with this Petition.

trust requirements under section 523(a)(4) of the Code. *See* App. at p. 59a, Memorandum Order and Judgment. The decision of the bankruptcy court was affirmed and the damages calculation was adopted.

The Court of Appeals for the Fifth Circuit first agreed with the bankruptcy and district courts and initially ruled that Texas law did not impose an express trust relationship between Bennett (the managing partner of the managing partner of a limited partnership) and the Respondents (limited partners twice removed) and adopted the damages calculation of the bankrtupcy court. *See LSP Inv. Partnership v. Archie Bennett (In re Bennett)*, 970 F.2d 138, 148-149 (5th Cir. 1992). By so ruling, the Fifth Circuit followed an unbroken line of authority that exceptions to discharge are narrowly construed against creditors and in favor of the bankrupt.[2]

Respondents filed a Petition for Panel and En Banc Rehearing with the Fifth Circuit. By Memorandum Opinion dated April 19, 1993, the panel reversed itself, issued virtually the same opinion based on the same authorities and analysis (still adopting the damages calculation of the bankruptcy court), yet reached an entirely opposite result from its first ruling. *See* App. at p. 3a. The Fifth Circuit, while applying the same analysis that it used to affirm the decisions of the bankruptcy and district courts, ruled that the question of nondischargeability of Bennett's debts as to the Respondents' under section 523(a)(4) was wrongly decided. The Fifth Circuit's self reversal was in contravention of the prevailing Circuit law of *Coburn Company*

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[2] *See Coburn Company v. Nicholas*, 956 F.2d 110, 113 (5th Cir. 1992) (citing *Boyle v. Abilene Lumber, Inc.*, 819 F.2d 583, 588 (5th Cir. 1987)). Further, the Fifth Circuit has uniformly applied section 523(a)(4) to deny a discharge *only* in cases where either the common law or a statute clearly and expressly imposes trustee-like obligations on the debtor. *See e.g., Carey Lumber Company v. Bell*, 615 F.2d 370, 374 (5th Cir. 1980). *See App.* at p. 28a, *LSP Inv. Partnership v. Archie Bennett (In re Bennett)*, 970 F.2d 138, 148-149 (5th Cir. 1992).

v. Nicholas, 956 F.2d 110 (5th Cir. 1992); *Carey Lumber Company v. Bell*, 615 F.2d 370 (5th Cir. 1980); and *Angelle v. Reed*, 610 F.2d 1335 (5th Cir. 1980). Compounding this error and extraordinary turn of events, the Court (while adopting the damages calculation of the bankruptcy court) then rendered judgment in favor of the Respondents in the amount of $1,904,204.40, far in excess of the 28% of $904,204.40 calculated by the trier of fact. *See* App. at p. 27a, *LSP Inv. Partnership v. Archie Bennett (In re Bennett)*, 989 F.2d 779 (5th Cir. 1993), *withdrawing*, 970 F.2d 138 (5th Cir. 1992).

Petitioner then filed a Petition for Panel and En Banc Rehearing with the Fifth Circuit requesting that the panel grant rehearing and reconsider its reversal. By Order dated May 21, 1993, the Fifth Circuit denied the Petition for Rehearing. Petitioner then filed a Second Petition for Panel and En Banc Rehearing with the Fifth Circuit in view of the gross error committed requesting reconsideration of the damages award which effectively awarded Respondents a windfall recovery on account of the 72% in limited partnership interests which never objected to the dischargeability of Bennett's debt. After eliciting a response from the Respondents (who were then forced to concede that they were entitled to but 28.4375% of the total damages award), the Fifth Circuit, on July 15, 1993, modified its judgment to award the Respondents 28.4375% of the $1.9 million damages award, yet failed to correct its error in awarding double damages against the Petitioner.

The Fifth Circuit's decision has consequences far beyond the Petitioner by holding nondischargeable (without any underlying fact findings or legal conclusions made by the trial court) an individual debtor's debts, arising solely from partnership obligations for the alleged acts of a partner to another partnership entity two steps removed from the debtor. In the Fifth Circuit, contrary to the Court of Appeals' ruling in this case, the entity theory of partnership is undisputedly clear and controlling. The

Court of Appeals in this case, however, ignores two legally cognizable entities between Bennett and MG, the entity to which Respondents had an interest. Decades of case law has limited the fiduciary standard of care under section 523(a)(4) to situations in which an express trust relationship exists. The Fifth Circuit's decision in this case eliminates this established standard for exceptions to discharge or partnership debts.

It gets worse. The Fifth Circuit's adoption of the bankruptcy court's damages calculation merits a result completely different from that rendered in favor of the Respondents. The award given replaces the factfinders' considered judgment that the evidence, if an express trust were found, mandated a damages calculation based upon *only* $904,204.40 in damages. This calculation by the fact finder is premised upon Bennett's deemed acts as the general partner of the managing partner (which itself was acting through Mariner Corporation) in causing MG to lease equipment for use in MG's hotel rather than purchasing it outright. The Fifth Circuit found instead $1.9 million, presuming a defalcation where none exists and implying a factfinding that Bennett would not have used a $1 million distribution allowed under MG's partnership agreement for the equipment had it been purchased instead. In computing this erroneous damages award, the Fifth Circuit put itself in the shoes of the trier of fact and weighed the evidence differently—an action indeed not permitted by this Court. *See Hanrahan v. Hampton*, 446 U.S. 754, 100 S. Ct. 1987, 64 L.Ed.2d 670 (1980).

Bennett therefore respectfully petitions the Supreme Court to issue writ of certiorari on the Fifth Circuit because (i) case law does not expressly and clearly impose a fiduciary duty on the general partner of the managing partner of a limited partnership as is required to render the Respondents' debts nondischargeable under section 523(a)(4) of the Bankruptcy Code, and (ii) the damages awarded by the Fifth Circuit are excessive and incon-

sistent with the trial court's account of the evidence and factual record in this case and therefore exceed damages permitted by applicable law.

Statement of Facts

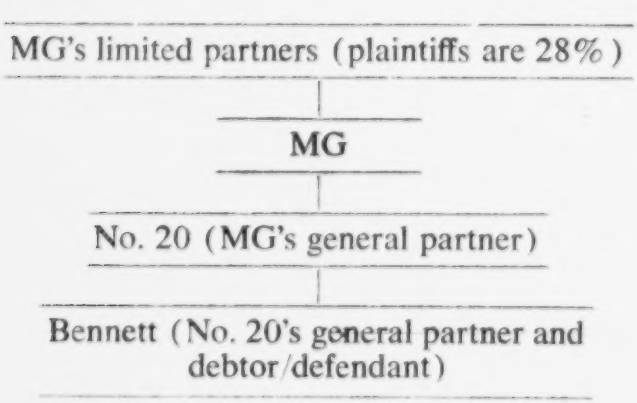
Petitioner relies upon the Bankruptcy Court's findings of fact, as set forth in its Memorandum Opinion, for facts relevant to issues presented for review. Some of the most important of those findings of fact which have not been challenged on appeal are as follows:

a. Plaintiffs are and were, at all relevant times in question, limited partners in MG. When the partnership agreement was executed for MG, such partnership was a legal entity, distinct from Bennett. Bennett individually executed such partnership agreement on a limited basis, and, only with respect to Paragraph 10 of the agreement. He signed it also on behalf of No. 20, of which he was the sole general partner.

b. No. 20 is and was, at all relevant times, the general partner of MG.

c. Bennett is and was, at all relevant times, the general partner of No. 20.

d. The background facts with Bennett and the Plaintiffs is best understood by the following diagram:



See App. at p. 61a.

The Bankruptcy Court also expressly found that:

> None of the Plaintiffs appeared or testified at trial, or offered any testimonial evidence that there existed any agreement, whether oral or written, other than the partnership agreement, which defined Bennett's obligations to the Partnership or to the limited partners. *No Plaintiffs testified or offered evidence that the partnership agreement was ambiguous or that their understanding of Bennett's individual duties to the Partnership were anything other than those set forth in the partnership agreement.* (Emphasis supplied.)

See App. at p. 89a.

REASONS FOR GRANTING THE WRIT

I. As A Matter Of Law, Petitioner Cannot Owe Respondents A Fiduciary Duty Within The Meaning Of Section 523(a)(4) Of The Bankruptcy Code

The question of whether a fiduciary relationship exists within the meaning of section 523(a)(4) is a question of federal law; however, reference to state law is necessary to determine whether a trust relationship exists. *Angelle*, 610 F.2d at 1341; Memorandum Opinion, App. at pp. 70-71a. Section 10 of Texas' version of the Uniform Partnership Act provides that a general partner in a limited partnership shall have all the rights and liabilities of a partner in a general partnership. TEX. REV. CIV. STAT. ANN. art. 6132a, § 10 (Vernon 1970) ("TUPA"). Pursuant to TUPA section 21, every partner is accountable as a fiduciary and must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. TUPA at § 21 (Vernon 1970).

The only reported decision prior to this case directly addressing this issue concluded that TUPA section 21 does not establish a technical or express trust. *In re Hur-*

bace, 61 B.R. 563, 566 (Bankr. W.D. Tex. 1986). Therefore, TUPA section 21 does not create an express or technical trust that would create a fiduciary obligation to partners sufficient to bar the discharge of a debt under section 523(a)(4). *Id.; see also Angelle v. Reed, supra*; Memorandum Opinion, App. at pp. 71-72a. The court in *Hurbace* reasoned that in order to establish the existence of a trust under Texas law, the proponent must prove that the settlor intended to create a trust, that the subject to which the trust obligation relates is certain, and that beneficiary is certain. TEX. PROP. CODE §§ 113.001-002 (Vernon 1984). Under TUPA section 21, a trust arises only when a partner derives profits without the consent of the partners. A trust that arises as a result of the wrongdoing is a trust *ex maleficio* specifically excluded from the purview of nondischargeable debts under section 523(a)(4). *Hurbace*, 61 B.R. at 566. The position of the *Hurbace* court, on which the bankruptcy court in this case relied, is in accord with other jurisdictions. *See In re Lewis*, 94 B.R. 406, 410 (Bankr. E.D. Va. 1988) ("This Court is convinced that the term 'fiduciary' as used in . . . § 523(a)(4) is limited . . . and does not extend to the more general class of . . . partners"); *In re Napoli*, 82 B.R. 378, 382 (Mankr. E.D. Pa. 1988); *In re Clemens*, 83 B.R. 945 (Bankr. N.D. Ohio 1988); *In re Elliott*, 66 B.R. 466, 467 (Bankr. S.D. Fla. 1986; *In re Holman*, 42 B.R. 848, 851 (Bankr. E.D. Mo. 1984).

The Fifth Circuit adopted a different result on rehearing. Under *Crenshaw v. Swenson*, 611 S.W.2d 886 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.), the Fifth Circuit stated it is the *only* case under Texas law that *arguably* supports the proposition that as a matter of law Bennett individually, as the general partner of a limited partnership which itself was a managing general partner of a separate limited partnership (MG), owes a fiduciary duty satisfying an express trust to some of MG's limited partners. *See* App. at p. 3a, *LSP Inv. Partnership v. Archie*

Bennett (In re Bennett), 989 F.2d 779 (5th Cir. 1993), *withdrawing*, 970 F.2d 138 (5th Cir. 1992). The Fifth Circuit's April 19, 1993, decision represents an unprecedented expansion of its previously clear and unambiguous mandate in *Angelle*—that a technical trust must exist prior to the act of wrongdoing creating the debt and without reference to that act for Bennett to owe the Respondents a fiduciary duty of loyalty. *Angelle*, 610 F.2d at 1338. In reversing itself, the Fifth Circuit rationalized that the *Crenshaw* court analyzed "this issue consistent with the way in which Texas jurisprudence has developed in this area . . ." to, in effect, now create a new rule of law—that a general partner of a limited partnership which itself was a managing general partner of a separate limited partnership owes fiduciary duties to the limited partners of the second limited partnership two steps removed from the debtor. *See* App. at pp. 25-27a, *Bennett*, 989 F.2d 779, 790. There is neither Texas case law nor a Texas statute which stands for this "new" rule of law. No express trust was created by virtue of the MG partnership agreement or as a matter of law which made Bennett a fiduciary to the Respondents. The Fifth Circuit has now used *Crenshaw*, a 1981 case decided on equitable principles *based upon certain specific unique facts*, to fashion a rule of law that would impose trustee-like duties on Bennett, the general partner of No. 20, which was itself the managing general partner of MG. See *Crenshaw*, 611 S.W.2d at 890 ("This is a suit in equity and in that realm, the conduct of the parties is judged by redefined standards"). To interpret the 1981 *Crenshaw* decision in this manner or to propose that *Crenshaw* established a trend in the development of Texas jurisprudence on partnerships, which embraces the Bennett situation, disregards established Texas law since that date and the Fifth Circuit's recent ruling that Texas partnerships are legal entities separate and distinct from their partners. *See Lakedreams v. Taylor*, 932 F.2d 1103, 1109 (5th Cir. 1991). There is no evidence in the record and certainly no find-

ings of fact made by the bankruptcy court which would support a ruling or a new rule of law that would undermine this maxim of modern uniform partnership laws in Texas and elsewhere and the integrity of the various partnership involved in the Bennett case.[3]

Prior to TUPA's adoption, characterization of a partnership interest was complicated by the tension inherent in treating a partnership as an aggregate of partners acting as individuals pursuant to a contract, as opposed to treating the partnership as an entity legally distinct from its partners. *See Humphrey v. Bullock,* 666 S.W.2d 586, 591 (Tex. App.—Austin 1984, writ ref'd n.r.e.). Various inequities arose in applying the aggregate theory and the doctrine of equitable conversion was a judicial response. *Id.* These inequities led to the adoption of TUPA which effectively established the partnership as an entity legally distinct from its partners. The seminal Texas Supreme Court case, *Haney v. Fenley, Bate, Deaton & Porter,* 618 S.W.2d 541, 542 (Tex. 1981), made the entity theory of partnership in Texas undisputedly clear and controlling. *See also Lawler v. Dallas Statler-Hilton Joint Venture,* 793 S.W.2d 27 (Tex. App.—Dallas 1990, writ denied) (successor in interest to partnership has defenses against the partnership as entity but not defenses against partner as individual); *ISO Production Management 1982, Ltd. v. M & L Oil and Gas Exploration, Inc.,* 768 S.W.2d 354 (Tex. App.—Waco 1989, no writ) (after adoption of the TUPA, a partnership was recognized as an entity legally distinct from its partners).[4] This is crucial to the evalua-

[3] Although the concept of fiduciary is to be narrowly defined as a matter of law, state law is to be consulted to determine when a trust in this strict sense exists. *Ragsdale v. Haller,* 780 F.2d 794, 796 (9th Cir. 1986) (court determined partners to be fiduciaries based on a statutory provision and string of case law imposing liability).

[4] Similarly, in *Lakedreams,* 932 F.2d at 1109 (5th Cir. 1991), in a preliminary injunction hearing whereby the defendant tried to

tion of what duties Bennett could *directly* owe to the Respondents as the general partner of a limited partnership which itself was the managing general partner of MG. At the trial level, Respondents never attacked the integrity of MG; the validity of the MG partnership agreement; nor that No. 20 was a separate partnership entity distinct from Bennett, individually. There was no evidence to cause No. 20 to be ignored.

Even given the muddled facts and the ambiguities in the *Crenshaw* case, there is no showing that the court in *Crenshaw* considered the entity distinction between the parties in ruling that the managing partner breached her fiduciary duty to the limited partners. It is hard to conclude with certainty what took place in *Crenshaw*. Yet, the *Crenshaw* result may be correct and equitable only within the context of the facts of that case. However, the result in *Crenshaw* is far different and more limited than the Fifth Circuit's April 19, 1993 ruling that, as a matter of law, Bennett was a fiduciary to the Respondents for dischargeability purposes under Section 523(a)(4) of the Bankruptcy Code.

The MG partnership agreement, to which No. 20 was the managing general partner, was unambiguous in fixing the limits of Bennett's personal involvement. *See* App. at p. 61a, Memorandum Opinion. Article 10 of the MG partnership agreement specifically delineated Bennett's duties, distinct from the duties of No. 20, none of which

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compare the economic harm resulting to him if the injunction were granted to the fact that the plaintiffs [partners] individually would suffer no economic harm by the court's denying the injunction, the court upheld the entity theory under Texas partnership law. The court stated, "Taylor's [defendant] argument misses the mark. . . . Taylor erroneously compares himself to Lakedreams' partners instead of to Lakedreams itself. Under Texas law, a partnership, like Lakedreams, is considered an entity separate from its partners." *Id.*

imposed fiduciary duties on Bennett to the Respondents.[5] *See* App. at pp. 61-62a, Memorandum Opinion; App. at pp. 272a and 280a, MG Partnership Agreement. Indeed, Bennett signed the MG partnership agreement individually as to Article 10 *only*. It is unrefuted that No. 20, a Texas limited partnership and a separate entity from Bennett, was designated as the general partner of the MG limited partnership and the party responsible for taking action for the benefit of MG. *See* App. at pp. 61-62a, Memorandum Opinion. Unlike *Crenshaw*, it is plain from the MG partnership agreement and the uncontroverted evidence which duties and responsibilities were to be performed by No. 20 versus those which were to be performed by Bennett in his individual capacity. The record establishes uncontroverted evidence that Mariner discharged the duties and responsibilities required to be performed by No. 20. *See* App. at pp. 63-64a, Memorandum Opinion. Indeed, the only writings that evidence the intent of the parties show that Bennett was *not* the general partner of MG and that Bennett individually had contracted only for certain specific undertakings pursuant to Article 10 of the MG partnership agreement. *See* App. at pp. 61-62a, Memorandum Opinion. The record contains no evidence from Respond-

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[5] Article 10 of the MG partnership agreement provides:

Archie Bennett, Jr., represents and warrants the following:

REPRESENTATIONS AND WARRANTIES
OF ARCHIE BENNETT, JR.

(a) That, during the terms of this Agreement, he will not voluntarily withdraw as general partner of the General Partner of the Partnership.

(b) That, during the terms of this Agreement, he will not sell, transfer, assign, pledge, hypothecate, or otherwise dispose or encumber his general partnership interest in the General Partner except for the Security Agreement granted hereunder, although the General Partner may assign the right to receive cash flow from his general partnership interest.

ents or otherwise that Bennett, individually was the bargained for fiduciary to the limited partners of MG. *See* App. at pp. 88-89a, Memorandum Opinion.[6] The April 19, 1993 opinion, however, completely disregards (i) No. 20's existence, separate and distinct from Bennett, (ii) Mariner's role of carrying out No. 20's duties and responsibilities, and (iii) the written agreement between the parties identifying and limiting Bennett's duties as distinct from the duties of No. 20. The result is an unprecedented expansion of what was previously an unambiguously narrow standard for sustaining exceptions to discharge under section 523(a)(4) of the Bankruptcy Code. *In re Boyle*, 819 F.2d 583 (5th Cir. 1987); *In re Cross*, 666 F.2d 873 (5th Cir. 1982). *Angelle v. Reed*, 610 F.2d 1335 (5th Cir. 1990).

In *Angelle*, the court held that the concept of "fiduciary" under section 523(a)(4) is narrowly defined, applying only to technical or express trusts, and not to those which the law implies. *Id.* at 1338. Fiduciary duties of loyalty in the context of section 523(a)(4) historically have been determined by federal law largely because of the strict interpretation of "fiduciary" under section 523 (a)(4). *Angelle*, 610 F.2d at 1341. The term "fiduciary" as used in section 523(a)(4) has been limited to a class of fiduciaries including trustees of specific written declarations of trust, guardians, administrators, executors, or public officers and, absent special considerations, does not extend to the more general class of fiduciaries such as agents, bailees, brokers, factors and partners. *In re Holman*, 42 B.R. 848, 851 (Bankr. E.D. Mo. 1984). Even when state law would impose a fiduciary duty of loyalty on a general partner, bankruptcy courts have consistently held that absent a technical or express trust relationship, a fiduciary duty under state law does not make a partner a

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[6] Respondents presented no evidence at trial to contradict the plain terms of the MG partnership agreement nor did they plead ambiguity in its terms. *See* App. at pp. 88-89a, Memorandum Opinion.

fiduciary for purposes of dischargeability litigation under section 523(a)(4). *See In re Stone*, 91 B.R. 589, 594 (D. Utah 1988) (general partner was not a fiduciary with respect to limited partners for purposes of bankruptcy exception from discharge of debt for fraud or defalcation while acting in fiduciary capacity); *In re Ryan*, 90 B.R. 554, 556 (Bankr. S.D. Fla. 1988) (although Uniform Limited Partnership Act makes a partner accountable to the partnership, it does not create a technical or express trust and does not make a partner a fiduciary for the purposes of section 523(a)(4)); *In re Braudis*, 86 B.R. 1001, 1004 (Bankr. W.D. Mo. 1988) (general partner did not owe a fiduciary duty to limited partners within meaning of Bankruptcy Code section making nondischargeable a debt for fraud or defalcation while acting in fiduciary capacity). This is the proper result given the common use of partnership vehicles in business where honest disputes such as those found here, are common. The benefits of a discharge should not be so easily lost unless gross wrongdoing has occurred.

Findings of fact are not to be set aside unless it is clearly erroneous. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985). Respondents presented no evidence that anything other than the MG partnership agreement is determinative of the relationship between the parties. The Bankruptcy Judge's findings of no express trust making Bennett a fiduciary may not be reversed unless *clearly erroneous* in light of the record in its entirety. The record amply supports the bankruptcy court's ruling.

II. The Fifth Circuit's Damage Award Improperly Gives Respondents A Double Recovery.

The Fifth Circuit affirmed the bankruptcy court's determination that the appropriate method of calculating damages in this case is based on actual damages. *Bennett*, 989 F.2d at 791, *citing, Preston Carter Co. v. Tatum*,

708 S.W.2d 23 (Tex. App.—Dallas 1986, writ ref'd, n.r.e.) (actual damages are permissible remedy for breach of fiduciary duty). As to the $832,204 in equipment leases and contracts charged to the limited partners and the $72,000 worth of repairs on the heating, ventilation and air conditioning system in the hotel (the "Capital Items"), which the bankruptcy court found could be the *only* actual damages, the Fifth Circuit found that Bennett incurred a debt for defalcation while acting in a fiduciary capacity under section 523(a)(4), making such debt non-dischargeable.[7] *See Bennett*, 989 F.2d at 791. The Fifth Circuit, however, without any evidentiary basis in the record went further to render judgment that the $1 million distribution was an additional defalcation by Bennett. *See Bennett*, 989 F.2d at 791. Effectively, the Fifth Circuit has factually presumed against Bennett that, had the $1 million stayed in the partnership, he would have directed the $1 million to purchase (rather than lease) the items for which a defalcation was found. This is in error, and without any factual or legal justification. *See* discussion *supra*.

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[7] Petitioner disputes that any defalcation could have occurred as a result of the equipment leases and contracts being charged to the MG limited partners. Article 1.6(b) of the MG partnership agreement provided that MG could "[p]urchase, receive, lease or otherwise acquire, own, hold, improve, use or otherwise deal in and with personal property, or any interest therein, wherever situated, in connection with the business of the Partnership." *See* App. at pp. 236-237a, Partnership Agreement. No. 20, in accordance with customary industry practice, leased the equipment constituting the alleged defalcation. Such action was done pursuant to the MG partnership agreement with full knowledge and approval of the Respondents, even though such knowledge and approval was not required by the MG partnership agreement. *See* App. at pp. 236-237a, Partnership Agreement. For Bennett to now be personally assessed a penalty for an act allegedly done by No. 20 in accordance with industry practice and the partnership agreement is unfounded and not supported by the facts or law in this case.

Bennett is being unjustly penalized by the Fifth Circuit. It is impossible for the additional damage award of $1 million to be "actual damages." The $1 million was distributed, that is true. But if the $1 million stayed in the partnership, then the presumption that the Fifth Circuit is making in the absence of a fact-finding to the contrary by the bankruptcy court is that the $904,204.40 in expenses would not have occurred. *See In re Webb*, 954 F.2d 1102 (5th Cir. 1992) (appellate [district] court is not free to weigh evidence as it would under a *de novo* standard). It is established precedent that the Fifth Circuit must view evidence and any inference that may be reasonably drawn in a light most favorable to the party prevailing at the trial level. *See Hanrahan v. Hampton*, 446 U.S. 754 (1980); *United States v. Brown*, 995 F.2d 1493 (10th Cir. 1993); *Jennings v. Tinley Park Community Consolidated School District No. 146*, 864 F.2d 1368, 1372 (7th Cir. 1988) (if the trial court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse the trial court's ruling even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently). The $1 million portion of the $1,904,204.40 damage award to the Respondents is an improper double recovery to the Respondents even when properly multiplied by their 28.4375% partnership interest because the Court's award of a $904,204.40 damage claim already makes the entire MG partnership interest whole. The additional recovery of $1 million gives the Respondents a windfall recovery for the same injury, without any legal or factual justification and contrary to the bankruptcy courts findings of fact and conclusions of law and the applicable federal standard.

Double recovery of damages is contrary to established Texas law. In Texas, an injured party is only allowed a single recovery, which has prompted Texas courts to adopt the "one satisfaction rule", a rule of general acceptance

that a plaintiff is entitled to *only* one satisfaction for sustained injuries. *Stewart Title Guar. Co. v. Sterling,* 822 S.W.2d 1, 7 (Tex. 1991), *citing, Bradshaw v. Baylor University,* 84 S.W.2d 703, 705 (Tex. Comm'n App.—1935, opinion adopted).

Petitioner submits that an error has been made and that the effect of the Fifth Circuit's damage analysis on future bankruptcy discharge actions would be to wrongfully presume or infer adverse facts against debtors which are the subject of a discharge objection in favor of parties having the financial wherewithal or legal savvy to pursue such claims. A new and questionable federal standard of apportioning damages is the (hopefully unintended) result of the Fifth Circuit's opinion. The rendering of the $1 million against Bennett was done *sua sponte* without an opportunity for Bennett to respond, without a hearing, without evidence, and in contravention of the bankruptcy court's findings of fact and conclusion of law and the applicable federal standard. If any question of fact or liability is conclusively presumed against Bennett, the winner at trial, this is not due process of law. *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950). "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer previous loss . . .'" *Goldberg v. Kelley,* 397 U.S. 254 (1970).

The Fifth Circuit rendered a judgment against Bennett for damages not requested by Respondents or contemplated by the bankruptcy court. The judgment was *sua sponte* decided by the Fifth Circuit with no factual or legal justification and contrary to the applicable federal standard. Rather, the Fifth Circuit's actions were based on the arguments made in the Respondents' Petition for Rehearing. Federal Rules of Appellate Procedure prohibited Bennett from filing a response absent a request from the Fifth Circuit, which never happened. *See* FRAP 40. By rendering its non-dischargeable judgment for $1 million

in excess of the damages calculated by the bankruptcy court instead of either affirming the damage award outright or remanding the case to the bankruptcy court for further proceedings consistent with its ruling, the Fifth Circuit violated Bennett's due process rights by (i) conclusively presuming against him a fact implicitly not accepted by the bankruptcy court that Bennett would have purchased the lease items for which a defalcation was found if the $1 million distribution was not made; and (ii) not permitting Bennett to controvert facts which presumed that Bennett was the alter ego of the Debtor's managing general partner. The result is clear—Bennett has been sentenced to a lifetime of collection efforts without any factual or legal justification for an alleged act which Bennett could not have done as a matter of law.

CONCLUSION

Based upon the arguments made herein and pursuant to the cited authorities, Petitioner Archie Bennett, Jr. requests that the United States Supreme Court grant the writ of certiorari to the Fifth Circuit and reverse the judgment rendered by the Fifth Circuit and deny Respondents all further relief.

Respectfully submitted,

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